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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**
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11 Southwest Fair Housing Council,
12 Plaintiff,
13 v.
14 WG Campana del Rio SH LLC,
15 Defendant.
16

No. CV-19-00179-TUC-RM
ORDER

17 Pending before the Court is Plaintiff's Motion in Limine to Preclude Testimony of
18 Defense Rebuttal Expert Robert Q. Pollard. (Doc. 67.) Defendant responded in opposition.
19 (Doc. 68.) The Court held an evidentiary hearing pursuant to *Daubert v. Merrell Dow*
20 *Pharms., Inc.*, 509 U.S. 579 (1993), on September 29, 2021. Upon considering the written
21 briefing by the parties and the testimony and argument presented at the evidentiary hearing,
22 the Court will grant in part and deny in part the Motion in Limine.

23 Plaintiff's Motion in Limine moves to preclude the testimony of Defendant's
24 rebuttal expert witness Robert Q. Pollard, Ph.D. pursuant to Federal Rule of Evidence 702
25 and *Daubert*, 509 U.S. 579. (Doc. 67.) Plaintiff argues that the testimony should be
26 precluded because (1) Dr. Pollard is not a qualified expert, (2) the testimony is unreliable
27 because Dr. Pollard does not explain how his experience leads to his conclusions nor does
28 he explain his methodology; (3) Dr. Pollard intends to testify as to pure unsubstantiated

1 speculations or beliefs and/or legal conclusions; and (4) Dr. Pollard intends to testify to
 2 Defendant's employee's state of mind. (*Id.* at 2.) Plaintiff further argues that Dr. Pollard's
 3 testimony would violate Fed. R. Evid. 403 by confusing and misleading the jury and unduly
 4 prejudicing Plaintiff while providing little probative value. (*Id.*) Thus, Plaintiff seeks
 5 preclusion of the testimony or, in the alternative, an Order limiting Dr. Pollard's testimony
 6 to the narrow issue of rebutting Plaintiff's expert's testimony regarding communications
 7 with deaf persons in a nursing home setting. (*Id.*)

8 In response, Defendant argues that Dr. Pollard's testimony should be admitted
 9 because (1) Dr. Pollard is a qualified expert; (2) the testimony is reliably based on his
 10 extensive experience in discrimination cases involving deaf individuals; (3) he will not
 11 offer legal conclusions or testimony concerning Defendant's employee's state of mind; (4)
 12 the testimony will help the jury because it is relevant to the factual issues the jury will be
 13 deciding; and (5) Dr. Pollard was disclosed as an initial expert and is not limited to the role
 14 of a "rebuttal expert." (Doc. 68.)

15 **I. Legal Standard**

16 "Evidence is relevant if (a) it has any tendency to make a fact more or less probable
 17 than it would be without the evidence; and (b) the fact is of consequence in determining
 18 the action." Fed. R. Evid. 401. "The court may exclude relevant evidence if its probative
 19 value is substantially outweighed by a danger of one or more of the following: unfair
 20 prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or
 21 needlessly presenting cumulative evidence." Fed. R. Evid. 403.

22 Admissibility of expert testimony is governed by Rule 702 of the Federal Rules of
 23 Evidence, which provides:

24 A witness who is qualified as an expert by knowledge, skill,
 25 experience, training, or education may testify in the form of an
 26 opinion or otherwise if: (a) the expert's scientific, technical, or
 27 other specialized knowledge will help the trier of fact to
 28 understand the evidence or to determine a fact in issue; (b) the
 testimony is based on sufficient facts or data; (c) the testimony
 is the product of reliable principles and methods; and (d) the
 expert has reliably applied the principles and methods to the

1 facts of the case.
 2 Fed. R. Evid. 702. This rule requires the trial court to “ensure that any and all scientific
 3 testimony or evidence admitted is not only relevant, but reliable.” *Daubert*, 509 U.S. at
 4 589. To do so, the court must assess “whether the reasoning or methodology underlying
 5 the testimony” is valid and “whether that reasoning or methodology properly can be applied
 6 to the facts in issue.” *Id.* at 592-93. This gatekeeping function applies not only to expert
 7 testimony based on “scientific” knowledge but also expert testimony based on “technical”
 8 and “other specialized” knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141,
 9 147-49 (1999). Its purpose is to ensure “that an expert, whether basing testimony upon
 10 professional studies or personal experience, employs in the courtroom the same level of
 11 intellectual rigor that characterizes the practice of an expert in the relevant field.” *Id.* at
 12 152.

13 Factors relevant to the reliability of expert testimony include, but are not limited to,
 14 whether the theory or technique used by the expert “can be (and has been) tested,” whether
 15 it “has been subjected to peer review and publication,” “the known or potential rate of
 16 error,” “the existence and maintenance of standards controlling the technique’s operation,”
 17 and the degree of acceptance in the relevant community of expertise. *Daubert*, 509 U.S. at
 18 593-94; *Kumho Tire*, 526 U.S. at 149-50. In assessing the reliability and helpfulness of
 19 proffered expert testimony, “no single factor is necessarily dispositive of the reliability of
 20 a particular expert’s testimony.” Fed. R. Evid. 702, Advisory Committee Notes (2000)
 21 (internal citations omitted).

22 Rule 702’s “helpfulness” standard requires that expert testimony be relevant to
 23 issues in the case and that there be “a valid scientific connection to the pertinent inquiry as
 24 a precondition to admissibility.” *Daubert*, 509 U.S. at 591. An expert’s opinions may not
 25 be premised on “subjective belief or unsupported speculation.” *Id.* at 590 (internal
 26 quotation marks omitted). Relevancy requires that “[t]he evidence ... logically advance a
 27 material aspect of the party’s case.” *Cooper v. Brown*, 510 F.3d 870, 942 (9th Cir. 2007).

28 The Court’s gatekeeping obligation under Rule 702 is “a flexible one” that “must

1 be tied to the facts of a particular case.” *Kumho Tire* at 150. Thus, “the trial judge must
 2 have considerable leeway in deciding in a particular case how to go about determining
 3 whether particular expert testimony is reliable.” *Id.* at 152. Whether to admit expert
 4 testimony is subject to the discretion of the Court. *See General Elec. Co. v. Joiner*, 522
 5 U.S. 136, 143 (1997).

6 **II. Background**

7 Dr. Pollard is a Clinical Professor of Psychiatry at the University of Rochester
 8 School of Medicine in Rochester, New York. (*See* Doc. 67-1.) He is also a Professor and
 9 Associate Dean of Research at the Rochester Institute of Technology’s National Technical
 10 Institute for the Deaf (“NTID”). (*Id.*) His career has been dedicated to “the subject of
 11 psychology and deaf individuals and related topics such as sign language interpreting, and
 12 public health and the deaf population.” (*Id.* at 12.) He has been a faculty member in the
 13 Department of Psychiatry at the University of Rochester School of Medicine for 29 years.
 14 (*Id.*) He founded the University’s Deaf Wellness Center, which conducts a variety of
 15 clinical service, training, research, and scholarship activities. (*Id.*) In August 2016, he
 16 became the first permanent Associate Dean of Research at the NTID. (*Id.*) There, he is
 17 responsible for the NTID’s research activities and oversees training grants and contract
 18 activities. (*Id.*) He engages in clinical service and research and has published over 100
 19 articles, books, and book chapters, served as principal investigator on 55 grants totaling
 20 over \$6M, delivered over 250 invited addresses throughout the U.S. and abroad, and made
 21 over 100 conference presentations. (*Id.*) He has also served as an expert witness in over 30
 22 cases alleging discrimination against a deaf individual. (*Id.* at 10.)

23 The opinions expressed in Dr. Pollard’s report are based upon his review of
 24 Plaintiff’s expert Dr. Shepard-Kegl’s report, along with his experience and knowledge in
 25 the fields of psychology and deafness and related topics. (*See id.* at 5.) Dr. Pollard’s expert
 26 report first reviews the conclusions of Dr. Shepard-Kegl’s report and responds to specific
 27 statements contained therein. (Doc. 67-1 at 4-6.) Specifically, Dr. Pollard describes Dr.
 28 Shepard-Kegl’s report as “incongruous” because of the distinction between the

1 “heterogeneity” and variability of deaf individuals—i.e. their unique abilities, needs, and
 2 preferences—and Dr. Shepard-Kegl’s application of “general” information regarding deaf
 3 individuals to the fictional deaf grandmother present in this case. (*Id.* at 5-6; *see also* Doc.
 4 61.)

5 Dr. Pollard’s expert report then reviews the transcripts of testers’ communications
 6 with Defendant’s staff and analyzes the extent to which those interactions and/or
 7 communications are consistent with his knowledge and experience regarding deaf
 8 individuals. (*Id.* at 7-10.) Dr. Pollard points out purported inconsistencies between the
 9 substance of the transcripts and Plaintiff’s arguments regarding the denial of a reasonable
 10 accommodation to a deaf individual; for example, that Plaintiff’s tester does not disclose
 11 until well into her conversation with Defendant’s employee that the fictional grandmother
 12 is deaf or that the grandmother has the ability to read and write, as well as the tester’s
 13 failure to raise the issue of reasonable accommodations when discussing her grandmother’s
 14 activities such as going to the movies or restaurants. (*Id.*)

15 Dr. Pollard concludes that the “general” nature of Dr. Shepard-Kegl’s expert report
 16 renders it not relevant to this litigation because it addresses neither a specific deaf
 17 individual nor anything specific regarding Defendant’s assisted living facility. (*Id.* at 10.)
 18 He further concludes that the report fails to thoroughly address the tester’s data that might
 19 suggest a different outcome than that argued by Plaintiff. (*Id.*) Lastly, he concludes that the
 20 Defendant in this case did not fail to do what was needed to meet the fictional deaf
 21 individual’s reasonable accommodation needs. (*Id.*)

22 **III. *Daubert* Hearing**

23 The Court held a *Daubert* hearing on September 29, 2021, at which Dr. Pollard
 24 testified as to his qualifications, methodology, experience, and conclusions, and each party
 25 presented its arguments as to why Dr. Pollard’s expert testimony should be either excluded
 26 or admitted. Dr. Pollard testified that his knowledge of reasonable accommodations for
 27 deaf individuals stems from his professional experience, his published research, his
 28 previous testimony in approximately fifty civil cases involving an American Sign

1 Language (“ASL”) interpreter as a reasonable accommodation, and his personal lived
 2 experience. Dr. Pollard then testified as to the methodology that he would use to determine
 3 whether an ASL interpreter was a reasonable accommodation for a deaf individual. He
 4 testified that he would consider two categories of information: information about the deaf
 5 individual and information about the situation or circumstance in which the interpreter was
 6 purportedly necessary. As to a deaf individual, Dr. Pollard testified that he would consider
 7 (1) the individual’s preferred communication modality; (2) the individual’s proficiency in
 8 that modality; (3) whether the individual uses hearing aids or other assistive technologies;
 9 (4) the individual’s “fund of information,” that is, the quantity and quality of the
 10 information or knowledge they possess; and (5) whether the individual has other
 11 developmental issues. As to a situation or circumstance, Dr. Pollard testified that he would
 12 consider (1) the stakes of the situation—for example, a medical procedure (high stakes) vs.
 13 a sales transaction (low stakes); (2) the communication methods used in the situation; and
 14 (3) the extent of hearing individuals’ knowledge about deaf individuals and deafness.

15 **IV. Discussion**

16 **A. Dr. Pollard is a qualified expert.**

17 Plaintiff argues first that Dr. Pollard is not a qualified expert because (1) he has no
 18 experience working in assisted living facilities that serve deaf individuals; (2) he has not
 19 testified as an expert witness at a civil trial in the past four years; and (3) he has no
 20 experience evaluating testers in fair housing cases. (Doc. 67 at 3.) In response, Defendant
 21 contends that the fact that Dr. Pollard has no experience working in an assisted living
 22 facility and has not testified at a civil trial in the last four years does not undermine his
 23 extensive experience with the issues involving reasonable accommodations for deaf
 24 individuals that the jury will decide and thus he is a qualified expert. (Doc. 68 at 4-5.)

25 The Court finds that Dr. Pollard is a qualified expert. His extensive experience
 26 working with deaf individuals in professional, clinical, research, and personal settings
 27 qualify him as an expert on the matters to which his testimony pertains. Furthermore, Dr.
 28 Pollard has testified as an expert in at least thirty civil legal cases. The Court finds no basis

1 upon which to question his qualifications as an expert witness.

2 **B. Dr. Pollard's testimony will be helpful to the jury.**

3 Plaintiff also argues that Dr. Pollard's testimony would not be helpful to the jury
4 because it merely recounts the Complaint and summarizes documents, both of which the
5 jury will be able to view and evaluate for itself. (Doc. 67 at 6.) Plaintiff argues that Dr.
6 Pollard's testimony does not provide information beyond that of a typical lay person and
7 that the jury can accomplish its own analysis of the evidence without Dr. Pollard's
8 opinions. (*Id.*) In response, Defendant contends that Dr. Pollard has specialized knowledge
9 and experience that will assist the jury in determining whether an ASL interpreter was
10 necessary to ensure effective communication under the circumstances present in this case,
11 and that this issue is beyond the scope of a typical juror's knowledge. (Doc. 68 at 6-7.)

12 The Court finds that Dr. Pollard's testimony will assist the jury in its fact-finding
13 duties to the extent it is admissible as set forth in this Order, except for his testimony that
14 Defendant did not fail or refuse to provide an ASL interpreter, discussed *infra* at Section
15 IV(E).

16 **C. Dr. Pollard's rebuttal testimony regarding Dr. Shepard-Kegl's expert**
17 **report is admissible.**

18 Plaintiff argues that if Dr. Pollard is permitted to testify, he should be limited to
19 rebuttal testimony only. (Doc. 67 at 8.) Plaintiff contends that Dr. Pollard was only engaged
20 in this case to rebut the opinions of its expert witness, Dr. Shepard-Kegl, and thus to
21 whatever extent his report exceeds the bounds of Dr. Shepard-Kegl's report it should be
22 excluded. (*Id.* at 8-9.) In response, Defendant contends that it disclosed Dr. Pollard as its
23 initial expert and did not identify him solely as a rebuttal expert, and thus he is not limited
24 to acting in that capacity. (Doc. 68 at 7-8.)

25 Plaintiff does not dispute Dr. Pollard's rebuttal testimony. As the Court has found
26 Dr. Pollard to be a qualified expert and has also found that his testimony will be helpful to
27 the jury, his testimony rebutting Dr. Shepard-Kegl's report is admissible. The Court further
28 finds that Defendant disclosed Dr. Pollard as an initial expert and therefore his testimony

1 is not limited to rebuttal testimony on that basis. (*See* Doc. 68 at 8.)

2 **D. Dr. Pollard’s testimony is not reliable regarding whether an ASL interpreter**
3 **was a reasonable accommodation for the fictional deaf grandmother.**

4 Plaintiff argues that Dr. Pollard’s testimony is unreliable because he has not
5 explained how his experiences in clinical psychology led to the conclusions he reached,
6 why his experience is sufficient, or how he applied his experience to the facts. (Doc. 67 at
7 4.) Thus, Plaintiff argues, because Dr. Pollard has not demonstrated a reliable methodology
8 for forming his opinions, they must be excluded. (*Id.*) In response, Defendant contends that
9 Dr. Pollard’s professional and expert witness experiences are directly relevant to the issues
10 that the jury will decide and that throughout his report, Dr. Pollard explains why he reached
11 the conclusions he did. (Doc. 68 at 5-6.)

12 The Court agrees with Plaintiff that Dr. Pollard has failed to adequately explain how
13 his experience and knowledge apply to the issue of whether an ASL interpreter was
14 necessary as a reasonable accommodation in this case. Specifically, Dr. Pollard testified at
15 the *Daubert* hearing that his methodology in determining whether an ASL interpreter
16 would be a reasonable accommodation for a deaf individual includes an evaluation of (1)
17 the individual’s preferred communication modality; (2) the individual’s proficiency in that
18 modality; (3) whether the individual uses hearing aids or other assistive technologies; (4)
19 the individual’s “fund of information,” that is, the quantity and quality of the information
20 or knowledge the individual possesses; and (5) whether the individual has other
21 developmental issues. There is no evidence in Dr. Pollard’s report or his hearing testimony
22 that he applied these factors to the fictional deaf grandmother who was the prospective
23 tenant of Defendant’s facility. Indeed, Dr. Pollard testified that he did not have enough
24 information about the fictional deaf grandmother to evaluate her need for an interpreter
25 based on those factors. Thus, there is no way that Dr. Pollard could have properly applied
26 his methodology to the facts at issue. *See Daubert*, 509 U.S. at 592-93. Accordingly, Dr.
27 Pollard’s testimony regarding the fictional deaf grandmother’s need or lack thereof for an
28 ASL interpreter will be excluded.

1 However, Dr. Pollard’s testimony is admissible to the extent that it sets forth his
 2 opinions about how the relative of a deaf individual—in this case, Plaintiff’s tester—would
 3 behave or communicate in the situation present in this case. Dr. Pollard also may testify to
 4 his opinion that the tester did not provide Defendant’s employee Mr. Ommegard with
 5 sufficient information for Defendant to be able to determine whether an ASL interpreter
 6 was necessary as a reasonable accommodation. Dr. Pollard adequately explained how he
 7 applied his methodology in evaluating the actions and communications of Plaintiff’s tester,
 8 and his expert opinions on this matter will assist the jury in its fact-finding.

9 **E. Dr. Pollard’s conclusions regarding whether Defendant failed to provide a**
 10 **reasonable accommodation are inadmissible.**

11 Plaintiff argues that Dr. Pollard’s opinions offer pure conclusions of law and thus
 12 are not admissible under Federal Rule of Evidence 702. (Doc. 67 at 6.) Specifically,
 13 Plaintiff takes issue with Dr. Pollard’s statements that (1) Defendant did not “flat-out” deny
 14 interpreter services and (2) Defendant did not fail to do what was necessary to meet the
 15 fictional deaf grandmother’s needs for reasonable accommodations. (*Id.* at 6-7.) Plaintiff
 16 contends that these statements are conclusions of law and thus should be excluded. (*Id.*) In
 17 response, Defendant contends that these statements are not legal opinions or conclusions
 18 but rather are opinions on an “ultimate issue” in the case and thus, pursuant to Federal Rule
 19 of Evidence 704, are not automatically objectionable on that basis. (Doc. 68 at 7.)

20 “[A]n expert witness cannot give an opinion as to her legal conclusion, i.e., an
 21 opinion on an ultimate issue of law.” *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523
 22 F.3d 1051, 1058 (9th Cir. 2008); *see also United States v. Boulware*, 558 F.3d 971, 975
 23 (9th Cir. 2009) (trial court did not abuse its discretion in excluding expert testimony in the
 24 form of a legal opinion).

25 As discussed above in Section IV(D), Dr. Pollard’s application of his methodology
 26 to the issue of whether the fictional deaf grandmother required an ASL interpreter as a
 27 reasonable accommodation for her deafness is inadmissible.¹ Because Dr. Pollard may not

28 ¹ Also inadmissible is Dr. Pollard’s testimony that Defendant did not fail or refuse to
 provide an ASL interpreter. The Court finds that such testimony would not be helpful to

1 testify to his opinion that an ASL interpreter was not a reasonable accommodation under
 2 these circumstances, he likewise may not testify to his conclusion, which follows from that
 3 opinion, that Defendant did not fail to provide that reasonable accommodation. In other
 4 words, because Dr. Pollard may not opine on the issue of whether the grandmother needed
 5 the requested reasonable accommodation, he may not opine on whether that request was
 6 properly denied because that conclusion rests entirely on the inadmissible portions of his
 7 opinion.

8 Furthermore, the Court finds that Dr. Pollard's conclusion that Defendant did not
 9 fail to meet the fictional deaf grandmother's reasonable accommodation needs is a legal
 10 conclusion and is also inadmissible on that basis. *See Nationwide Transp. Fin.*, 523 F.3d
 11 at 1058; *see also* Doc. 61 at 19-20 (denying summary judgment on the issue of whether
 12 Defendant violated the Americans with Disabilities Act by failing to provide a reasonable
 13 accommodation in the form of an ASL interpreter).

14 **F. Dr. Pollard's statements regarding Defendant's employee Mr. Ommegard**
 15 **are inadmissible.**

16 Plaintiff argues that Dr. Pollard's report improperly offers opinions as to
 17 Defendant's employee's state of mind. (Doc. 67 at 7-8.) Plaintiff argues that Dr. Pollard's
 18 statements as to the state of mind of Defendant's employee Mr. Ommegard,² are improper
 19 because they are subjective and rest on assumptions not based on Dr. Pollard's knowledge
 20 or experience. (*Id.*) In response, Defendant contends that Dr. Pollard's statements regarding
 21 Mr. Ommegard's intentions during his conversation with Plaintiff's tester are
 22 "interpretations" that point out information Plaintiff's tester failed to provide. (Doc. 68 at
 23 7.) Defendant argues that the point of Dr. Pollard's opinions regarding Mr. Ommegard's
 24 statements is to show Plaintiff's tester's failure to clearly express her fictional deaf
 25 grandmother's need for an interpreter. (*Id.*)

26 _____
 27 the jury because the jury can evaluate for itself, based on the recorded conversations
 28 between Plaintiff's tester and Defendant's employee, whether Defendant failed or refused
 to provide an ASL interpreter.

² Mr. Ommegard is Defendant's Community Sales Director, with whom Plaintiff's tester
 toured the assisted living facility in June 2016. (*See* Doc. 61 at 4.)

The Court agrees with Plaintiff that Dr. Pollard's testimony regarding Mr. Ommegard's intentions, state of mind, and scope of authority is not admissible. Dr. Pollard did not explain how he applied his methodology to Mr. Ommegard's communications with Plaintiff's tester. Furthermore, Dr. Pollard's opinions regarding Mr. Ommegard's statements appear to be subjective and not based on his knowledge or experience. Dr. Pollard testified during the *Daubert* hearing that he did not review Mr. Ommegard's job description or qualifications and knew nothing about him. Thus, his expert testimony on this matter is not reliable and will be excluded.³

Accordingly,

IT IS ORDERED that Plaintiff's Motion in Limine to Preclude Testimony of Defense Rebuttal Expert Robert Q. Pollard. (Doc. 67) is **granted in part and denied in part** as follows:


(1) Dr. Pollard's testimony regarding whether an ASL interpreter was a reasonable accommodation for the fictional deaf grandmother is **inadmissible**.

(2) Dr. Pollard's testimony regarding whether Defendant failed to provide a reasonable accommodation is **inadmissible**.

(3) Dr. Pollard's testimony regarding the intentions, state of mind, and scope of authority of Defendant's employee Mr. Ommegard is **inadmissible**.

(4) Dr. Pollard's testimony is otherwise **admissible**.

Dated this 13th day of October, 2021.


Honorable Rosemary Márquez
United States District Judge

³ Dr. Pollard may testify generally to the interactions and communications between Mr. Ommegard and Plaintiff's testers in order to explain his opinions. His testimony regarding Mr. Ommegard is inadmissible only to the extent that he reaches conclusions about Mr. Ommegard's state of mind and/or scope of authority.